

Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act

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INTRODUCTION

Section 2 of the Voting Rights Act allows racial minorities¹ to prevent the use of electoral systems and other voting laws that have discriminatory “results,” without having to secure a federal court finding that those electoral systems or voting laws are *purposefully* discriminatory.² Since 1982, this results standard has primarily been used to replace at-large election

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1. The terms “race” or “racial” are used throughout this Article to also encompass the language minority groups covered by section 2 of the Voting Rights Act. *See, e.g.*, *Tennessee v. Lane*, 124 S. Ct. 1978, 2007-13 (2004) (Scalia, J., dissenting) (using the term “race” to encompass a Court precedent involving Puerto Rican voters). The term “language minority group” in the Voting Rights Act covers Asian Americans, Alaskan Natives, Native Americans, and those of Spanish heritage. 42 U.S.C. § 1973l(c)(3) (2000).

2. 42 U.S.C. § 1973(a) (2000).

systems with single-member districts so that at least one of those districts contains a majority of persons of a racial minority group.³ These districts then give those minority persons the opportunity to safely elect a candidate of their choice, with the winning candidate often being a member of the same race as the minority voters who make up the majority of the district's population.⁴

While section 2 has been a fixture of the Nation's electoral landscape for more than two decades, recent decisions from the Supreme Court have caused a number of commentators to question the statute's constitutional validity,⁵ with two threads of the Court's jurisprudence causing this questioning. First, the Court has embarked upon a federalism revolution that has provided state and local governments with much greater protection from the reach of Congress.⁶ Second, the Court has exhibited a general distaste for race-based remedies, as evidenced by the shift toward a strict nondiscrimination view of equal protection,⁷ with the Court generally only being willing to allow the implementation of a race-based remedy when presented with very compelling and specific evidence of past purposeful discrimination.⁸

3. See Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH* 378, 383-86 (Chandler Davidson & Bernard Grofman eds., 1994). See also Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 *STAN. L. REV.* 731, 739-40 (1998).

Until the 1980s, most local elections were conducted at large, and most southern states elected at least some of their state legislators from multimember districts. But after a decade of intense litigation, most jurisdictions with substantial black populations had switched to election systems that contained at least some single-member districts, and state legislatures were elected entirely from single-member districts, at least some of which were majority black.

Id.

4. See *Georgia v. Ashcroft*, 539 U.S. 461, 481-82 (2003) (describing the likely electoral results in districts that safely allow minority voters to elect a candidate of choice).

5. See, e.g., Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 *MICH. L. REV.* 2341, 2403 n.357 (2003) (listing commentators who have questioned the constitutionality of section 2).

6. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (restraining federal power over state officials in finding the Brady Bill unconstitutional).

7. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (describing the "central mandate" of the Equal Protection Clause as "racial neutrality in governmental decisionmaking.>").

8. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221-24 (1995) (describing the parameters of the Court's equal protection doctrine). Accord Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 *TUL. L. REV.* 1941, 1942-43 (2004) (describing how a number of recent decisions had "suggested a Court that was poised

These two big-picture trends converge with the Court's adoption of the congruence and proportionality⁹ doctrine as a limitation on Congress' ability to use the enforcement power it has been granted under the Reconstruction Amendments.¹⁰ Often, Congress uses its enforcement power to pass statutes that allow federal courts to remedy or deter activity by state and local governments that does not rise to the level of a constitutional violation as defined by the Court—the quintessential example of this being when Congress passes a statute that allows for federal courts to provide remedies upon a finding of discriminatory effect, without having to find that an unconstitutional purpose was at work. Thus, it is unsurprising that the Court's dual motivations for establishing this new¹¹ congruence and proportionality doctrine have been to protect state and local governments from federal interference, and to protect the Court's own ability to define the parameters of constitutional law.¹² In practice, the doctrine protects these federalism and separation of powers values by requiring Congress to amass a compelling factual record of constitutional violations by state and local governments before enacting a remedy that provides more protection for citizens against these governmental entities than the Court would provide under the Constitution standing alone.¹³

Section 2's constitutionality appears to hinge upon its ability to be congruent and proportional.¹⁴ However, section 2 conflicts with federalism values because it allows the federal courts to intrude upon the electoral process of state and local governments. It also conflicts with separation of

to strike down all governmental uses of race.”).

9. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (adopting the congruence and proportionality standard).

10. U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2.

11. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 117 (2000) (describing congruence and proportionality as a “new rule of doctrine.”).

12. See David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 37 (1997) (describing the twin rationales for congruence and proportionality).

13. See, e.g., *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

14. I say “appears” because the Court has only applied its congruence and proportionality doctrine to congressional remedies passed pursuant to the Fourteenth Amendment, and has not yet applied this doctrine to congressional remedies passed pursuant to the Fifteenth Amendment. Compare *Garrett*, 531 U.S. 356 (using the congruence and proportionality doctrine to reject legislation enforcing the Fourteenth Amendment) with *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding a voting rights remedy under the Fifteenth Amendment prior to the establishment of the congruence and proportionality doctrine). See also Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 273-77 (2003).

powers values by providing a race-based remedy without a specific and compelling showing of unconstitutional racial discrimination. Put more concretely, section 2 provides more protection for citizens against state and local governments than the Court would provide under the Constitution itself by replacing a constitutional purpose test with a statutory results test¹⁵—and this has been done in the arguable absence of a compelling enough legislative history of constitutional violations.¹⁶

Despite the fact that a number of commentators have questioned the validity of section 2 under the congruence and proportionality standard, federal courts have continued in their unanimous endorsement of the constitutionality of this voting rights remedy.¹⁷ This overwhelming judicial support can be explained by a number of practical reasons, including: the Court's historic (i.e., pre-Rehnquist Court) willingness to uphold Voting Rights Act remedies that greatly intrude into state and local prerogatives¹⁸ and that allow minority plaintiffs to deter or prevent the implementation of voting laws without having to prove purposeful discrimination;¹⁹ the current Court's use of the Voting Rights Act as a shining example of a valid use of Congress' enforcement power even in those decisions in which the Court has scaled back Congress' ability to exercise that power;²⁰ and the

15. Compare 42 U.S.C. § 1973(a) (2000) (applying results test to challenges to voting laws) with *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (applying purpose test to challenges to voting laws).

16. Compare Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 620 (2004) (noting that "[t]he legislative history of the amendments to section 2 of the Voting Rights Act, however, shows that Congress appeared to be primarily concerned with the meaning of the amendments and the prospective effect they would have on the electoral process, rather than on a history of discrimination preceding them.") with Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 733 (1997) (noting that "[t]he record before Congress in 1982 revealed numerous 'modern instances of generally applicable [election] laws passed because of [racial] bigotry.'" (alteration in original) (citation omitted)).

17. *United States v. Blaine County*, 363 F.3d 897, 905 (9th Cir. 2004) (upholding section 2 while noting that the decision "join[s] all of the other 'lower courts [that] have unanimously affirmed [section 2's constitutionality].'" (citation omitted)).

18. See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding an "array of potent weapons" designed to prevent voting discrimination by state and local governments). See also *Boerne*, 521 U.S. at 526 (describing the remedies in the Voting Rights Act as "strong" and "unprecedented.").

19. See *City of Rome*, 446 U.S. at 173 (upholding effects test found in section 5 of the Voting Rights Act). See also *Mississippi Repub. Exec. Comm. v. Brooks*, 469 U.S. 1002, *aff'g* *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984) (three-judge panel) (upholding constitutionality of section 2).

20. See *Garrett*, 531 U.S. at 373-74 (distinguishing the propriety of the Voting Rights Act with the impropriety of Title I of the Americans with Disabilities Act); *United*

ability of federal judges to count votes on the current Court because Justice Sandra Day O'Connor, who likely represents the swing vote on this matter,²¹ has strongly implied that she would uphold section 2.²²

In this Article, I try to move beyond these arguments of judicial reality to provide a bit more of a theoretical underpinning for why section 2 plainly conforms to the current Court's (or, for that matter, any moderately conservative Court's) vision of the scope of Congress' enforcement power. In doing so, I identify three core values that demonstrate section 2's validity as an exercise in what might be called "affirmative democracy." The first value is that racial discrimination in voting amounts to a context where the Court will allow a greater amount of race-based decision-making that favors racial minorities and a greater amount of congressional imposition of remedies against state and local governments.²³ The second value is that section 2 amounts to only a small encroachment on the Court's ability to define the substance of constitutional law because section 2 closely conforms to the Court's own equal protection doctrine as it relates to racial discrimination in general and, particularly, as it relates to racial discrimination in voting. The third value is that section 2 amounts to a relatively small burden on federalism—a burden probably not much greater than the federalism burden imposed by the Constitution itself.

I. RACIAL DISCRIMINATION IN VOTING IS DIFFERENT

The key principle underlying the premise that racial discrimination in voting is different is the idea of context. The Court's recent decisions, most notably in the affirmative action and racial gerrymandering cases, show that it will allow a greater use of race-based remedies depending on the context. Similarly, other recent decisions, most notably in cases involving the Family and Medical Leave Act and Title II of the Americans With Disabilities Act, show that in some contexts Congress may make greater

States v. Morrison, 529 U.S. 598, 625-27 (2000) (distinguishing the propriety of the Voting Rights Act with the impropriety of the Violence Against Women Act).

21. John Matthew Guard, "Impotent Figureheads?" *State Sovereign Immunity, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores*, 74 TUL. L. REV. 329, 359 (1999). "Any determination of section 2's constitutionality will probably hinge on Justice O'Connor's vote." *Id.*

22. Bush v. Vera, 517 U.S. 952, 990-92 (1996) (O'Connor, J., concurring).

23. I have previously explored the idea that voting rights remedies might have less of a problem with the Court's congruence and proportionality doctrine than other remedies the Court has recently rejected. Pitts, *supra* note 14, at 268-77. This Article seeks to further expand upon this idea.

use of its enforcement power. So, the aim of this section is to briefly demonstrate that racial discrimination in voting amounts to a context in which the Court will allow both a greater use of race-based remedies and a greater use of the enforcement power. However, even with the Court's willingness to loosen its grip in these contexts, it remains important to keep in mind that definite limits accompany both the use of race-based remedies and Congress' use of its enforcement power. Accordingly, this section concludes with a short discussion of these limits.

A. RACIAL DISCRIMINATION IN VOTING IS A DIFFERENT CONTEXT FROM A SUBSTANTIVE EQUAL PROTECTION PERSPECTIVE

The general trend of the Court's equal protection doctrine has been a move toward the idea that equal protection means nondiscrimination against any individual. This has played itself out in a shift toward: (1) eliminating the government's use of race to counteract any "societal" discrimination that occurred (or is occurring) in this Nation;²⁴ (2) applying strict scrutiny to every governmental use of race, including the use of race designed to favor racial minorities;²⁵ (3) finding any governmental action subjected to strict scrutiny to be unconstitutional unless a compelling showing of purposeful racial discrimination can be demonstrated;²⁶ and (4) requiring a greater and more specific evidentiary basis of actual purposeful discrimination in order to uphold the government's use of a race-based remedy.²⁷

24. Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004) (describing how the Court has not embraced the idea that a race-based remedy "can be justified as compensation for past societal discrimination."); Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1576 (2002) (describing how "the Supreme Court has consistently held that a desire to remedy societal discrimination provides a constitutionally inadequate basis for race-conscious affirmative action plans.").

25. *Adarand*, 515 U.S. at 224 (noting that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" and "that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

26. *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003) (allowing that some of the Court's opinions might have been "read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.").

27. *Shaw v. Reno*, 509 U.S. 630, 656 (1993) (allowing that there is "a significant state interest in eradicating the effects of past racial discrimination . . . [b]ut the State must have a strong basis in evidence for [concluding] that remedial action [is] necessary.") (internal quotes omitted). See also *Bush*, 517 U.S. at 982 (plurality opinion).

Recently, though, these principles have been shown to have some “play in the joints.”²⁸ The racial gerrymandering decisions demonstrate that not all purposeful uses of race by the government will end up being subjected to strict scrutiny.²⁹ When a government draws electoral districts, the use of race will only become subject to strict scrutiny when racial considerations *predominate* in the process in such a way as to subordinate traditional districting principles (e.g., compactness).³⁰ The affirmative action decisions demonstrate that the government’s use of race can survive strict scrutiny despite the lack of compelling evidence of purposeful, unconstitutional discrimination on the part of the government entity seeking to make race-based decisions.³¹

Admittedly, gerrymandering differs from affirmative action in that the latter type of government activity immediately invokes strict scrutiny and the former does not;³² however, in the big picture, it would appear that the Court’s decisions in both areas represent slices from the same pie.³³ This is

A State interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, “identified discrimination”; second, the State “must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, ‘before it embarks on an affirmative action program.’”

Id. (quoting *Shaw v. Hunt*, 517 U.S. 899, 910 (1996)).

28. *Locke v. Davey*, 540 U.S. 712, 718 (2004).

29. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). “Race must not simply have been a motivation for the drawing of a majority-minority district, but the predominant factor motivating the legislature’s districting decision.” *Id.* (internal cites, emphasis, and quotes omitted). See also Michelle Adams, *Grutter v. Bollinger: This Generation’s Brown v. Board of Education?*, 35 U. TOL. L. REV. 755, 768 (2004) (describing how the Court has “taken its foot off the accelerator” in the voting rights context by making it less likely that a race-based redistricting will be struck down as unconstitutional).

30. *Bush*, 517 U.S. at 959 (plurality opinion). “For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were subordinated to race.” *Id.* (internal quotes omitted).

31. *Grutter*, 539 U.S. at 325-30 (describing how the University of Michigan Law School had a compelling interest in using race even in the absence of evidence of past discrimination).

32. The distinction between these cases is that the affirmative action decisions involve government conduct that is facially race-based, whereas the racial gerrymandering decisions involve government conduct that is facially race-neutral. *Adarand*, 515 U.S. at 213 (distinguishing between “government conduct that is explicitly race-based and government conduct that, although facially race-neutral, results in a racially disproportionate impact and is motivated by a racially discriminatory purpose.”).

33. Professor Pamela S. Karlan presciently made the connection between racial gerrymandering and affirmative action prior to the Court’s recent affirmative action decisions. See generally Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569 (2002).

because *context* is what really fuels these allowances of race-based government decision-making, in that a government's use of race to benefit racial minorities will be treated differently by the Court depending on the context—this lesson of context being explicit with regard to affirmative action³⁴ and, I would argue, implicit with regard to voting rights because the affirmative action decision cites a voting rights case for this principle of context.³⁵ In addition, I would contend that voting rights is a different context because the Court carved out a completely new doctrine in the racial gerrymandering cases to address the use of race in redistricting.³⁶

But if context makes all the difference, then the question becomes why. Why should one context be different from another when it comes to the use of race in government decision-making? More to the point, why would voting and higher education form a different context for the government's use of race to benefit certain minority groups? What makes these areas distinctive? These questions are important because, without a theoretical underpinning for differentiating the use of race in different contexts, the Court's jurisprudence takes on the character of unprincipled judges enforcing their own legislative preferences.

In my view, the simple theoretical answer comes from the idea that the Court has traditionally considered education and voting to be more "fundamental."³⁷ Yet to describe education and voting as "fundamental" amounts to "little more than a [judicial] play upon words."³⁸ What makes

34. *Grutter*, 539 U.S. at 327. "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.*

35. *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

36. Prior to the decisions in the racial gerrymandering cases, when the government took an action that used race in a facial manner, the Court would use strict scrutiny to determine whether the government action was unconstitutional. *See, e.g., Adarand*, 515 U.S. 200. In the alternative, if the government used race in a non-facial manner, the Court would use a discriminatory purpose analysis to determine whether the government action was unconstitutional. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). In the racial gerrymandering cases, the Court does not either immediately subject the use of race to strict scrutiny nor find that the use of race amounts to an unconstitutional discriminatory purpose. Instead, the Court uses a two-step process that has no peer in the Court's racial discrimination jurisprudence in that it first decides whether race was a predominant factor and, if so, then decides whether the use of race complies with strict scrutiny. *See, e.g., Bush*, 517 U.S. at 952.

37. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (describing as "fundamental" the right to be free of racial segregation in education); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (describing voting as "a fundamental matter in a free and democratic society."). *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (describing voting as "too precious [and] too fundamental" to be burdened by the imposition of a poll tax).

38. *Nixon v. Herndon*, 273 U.S. 536, 540 (1929).

them fundamental, at least to this Court, appears to be the essential role higher education and voting play in fostering the Nation's democracy. The use of race in higher education to benefit racial minorities receives more deference from the Court in large part because higher education creates good citizens, leads to greater participation in the Nation's civic life, and trains the future leaders of the Nation;³⁹ and, absent the use of race in higher education, the Nation's democracy might be weakened by a lack of diversity that would cause the Nation's democracy to be perceived as illegitimate in the eyes of many citizens.⁴⁰

While the current Court has yet to explicitly apply these ideas of the fundamental nature of our democracy to the government's use of race to benefit racial minorities in the voting context, it would not seem to be much of a leap to do so.⁴¹ Indeed, nothing could more directly implicate the fundamental nature of our democracy than the act of casting ballots and electing candidates.⁴² Moreover, what good would it be if higher education created a diverse group of good citizens if some of those citizens were then denied the right to cast a ballot by inequitable voter registration laws?⁴³ And what good would it be to allow higher education to foster more diverse participation in the Nation's civic life and to create a diverse set of leaders that legitimizes the democratic process in the eyes of the populace if, upon graduation, some citizens get shut out of the political process because racial bloc voting prevents them from getting elected at the local and state level?⁴⁴

39. *Grutter*, 539 U.S. at 332. *Accord Plyler v. Doe*, 457 U.S. 202, 221 (1982) (describing the Nation's public schools as "a most vital civil institution for the preservation of a democratic system of government.").

40. *Grutter*, 539 U.S. at 332. "[I]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race" *Id.* See also *id.* (stating that "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."). *Accord Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969). "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.*

41. See *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring) (analogizing equal protection claims involving voting and education).

42. See *Rice v. Cayetano*, 528 U.S. 495, 495-96 (2000) (describing "the exercise of the voting franchise" as "the most basic level of the democratic process.").

43. See, e.g., *Miss. State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (holding that Mississippi's voter registration laws violated section 2).

44. While racial bloc voting does form some of the underpinning for the idea that voting is different, it will only be one small part of a moderately conservative Court's view of why voting is different. In other words, such a Court seems highly unlikely to adopt the view posited by some commentators that racial bloc voting amounts to present-day purpose-

Voting also implicates the fundamental underpinnings of our democracy because, as the Court informed us more than a century ago, voting preserves all rights.⁴⁵ Basically, under this philosophy, the greater the access to the political process provided to the minority group, the less incentive government officials will have to engage in discrimination against that group.⁴⁶ Put differently, greater access to voting allows racial minorities a much better chance to get nondiscriminatory treatment in “governmental services, such as public schools, housing, and law enforcement.”⁴⁷ In anecdotal terms, it is the switch from the pre-Voting Rights Act strict segregationist Senator Strom Thurmond to the Senator Thurmond who, decades later, voted to extend the Act.⁴⁸

So, voting and higher education implicate core democratic values; yet that does not serve as the sole reason why they present a different context for the Court. The use of race in voting and higher education gets an extra boost because these contexts implicate other constitutional areas where the Court traditionally shows some greater measure of judicial restraint. Higher education implicates First Amendment deference to academic freedom.⁴⁹ Thus, universities receive greater leeway from the Court to chart their own course in determining how best to achieve their goal of properly educating students.⁵⁰ Similarly, voting implicates the Court’s traditional

ful discrimination that serves as a unique justification for race-based voting remedies. *See generally*, Karlan, *supra* note 16. *See also* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1227-32 (1996) (engaging in an extended discussion of racially polarized voting and positing that “race-conscious districts, unlike most affirmative action programs, can be seen as designed to prevent present-day discrimination.”). Here are three brief reasons why: (1) such a Court would undoubtedly criticize traditional statistical analysis of bloc voting for failing to prove that racial discrimination and not some other factor, such as political preference, explains why voters cast their ballots along racial lines; (2) such a Court would likely find racial bloc voting to be purely private activity not reachable by the Fourteenth and Fifteenth Amendments and that there is not enough of a causal nexus between historical discrimination by the government and racial bloc voting; and (3) such a Court, even if it did consider bloc voting to be government activity, would generally be interested in the nondiscrimination principle and would look dimly upon signing off on a racial remedy when both minority and non-minority voters engage in the same kind of race-based activity.

45. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing voting as “preservative of all rights.”).

46. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

47. *Id.*

48. *See* J.Y. Smith, *Ex-Senator Thurmond Dies at 100*, WASH. POST at A01 (June 27, 2003) (describing Senator Thurmond’s shifting views during his career).

49. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.” *Id.*

50. *Grutter*, 539 U.S. at 329. “Our holding today is in keeping with our tradition of

deference to the political process,⁵¹ to stay out of the “political thicket,”⁵² and, in the opinion of at least one commentator, the First Amendment right of association.⁵³ Of course, this does not create an absolute deference on either front—it merely provides a bit more leeway to government actors operating in these realms.

In actuality, it is unsurprising that the Court would be a little bit more forgiving of the use of race to benefit racial minorities in certain contexts. A context-based analysis of the government’s use of race in its decision-making mirrors the way the Court has handled its own task of determining whether government officials have acted with an unconstitutional discriminatory purpose. As Professor Daniel Ortiz recognized several years ago, the Court has generally made it easier for racial minorities to prove purposeful racial discrimination in certain contexts, including voting and education.⁵⁴ So, if the Court seems willing to make it easier for racial minorities to prove unconstitutional discrimination in education and voting, it seems logical to allow government actors some freedom to make decisions in these contexts that provide a bit of extra benefit to racial minorities. After all, if the Court holds government actors to a higher standard of non-discrimination against racial minorities in certain contexts, then the least it can do is give these actors some greater amount of room to provide benefits to racial minorities so that these actors can keep themselves from running afoul of the Constitution.⁵⁵

B. RACIAL DISCRIMINATION IN VOTING IS A DIFFERENT CONTEXT FROM A CONGRESSIONAL ENFORCEMENT POWER PERSPECTIVE

For many years it appeared that Congress had pretty broad enforcement power to apply whatever sort of civil rights remedies it wanted against state and local governments in order to prevent these entities from

giving a degree of deference to a university’s academic decisions” *Id.*

51. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (declining to engage the federal judiciary in the political question of partisan gerrymandering).

52. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

53. See generally Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003).

54. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1137 (1989) (describing how it is more difficult to prove intent in housing and employment discrimination cases than in cases involving voting, education, and jury selection).

55. See *Bush*, 517 U.S. at 977 (remarking on how the states should not be “trapped between the competing hazards of liability” when engaging in race-based districting to comply with section 2) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O’Connor, J., concurring in part and concurring in judgment)).

engaging in violations of the Reconstruction Amendments. Essentially, this meant that the Court only required Congress to show that a rational basis existed for any civil rights remedy it passed.⁵⁶ And while it is accurate to say that Congress' power to enact civil rights remedies was by no means absolute,⁵⁷ Congress' power could aptly be described as nearly plenary.⁵⁸

The current Court, however, ended rational basis scrutiny for Congress' use of its enforcement power, replacing this deferential scrutiny with a much tougher test of "congruence and proportionality."⁵⁹ This test of congruence and proportionality has a number of nuances and considers a number of different factors that are too numerous to delimit here.⁶⁰ What is important for our purposes is that, at its core, congruence and proportionality first involves the Court's determination of how often government actors have engaged in the actual constitutional violations that Congress seeks to remedy or prevent and then moves to a determination of whether Congress properly tailored its legislation to fit the nature and extent of the actual identified constitutional violations.⁶¹

The Court's initial implementations of congruence and proportionality doctrine indicated that the test would be almost impossible to meet⁶² and perhaps might be "fatal in fact"⁶³ to any statute subjected to the doctrine.⁶⁴

56. Geoffrey Landward, *Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU EDUC. & L.J. 313, 318 (noting that before the 1990s Congress had enforcement power that was "seemingly limitless.").

57. See *Oregon v. Mitchell*, 400 U.S. 112, 267-68 (1970) (holding that Congress could not use its enforcement power to lower the age requirement for state and local elections).

58. In addition to enforcing the Fourteenth Amendment guarantee of equal protection and the Fifteenth Amendment prohibition on racial discrimination in voting, Congress has the power to enforce provisions of the Bill of Rights against the states using the Due Process Clause of the Fourteenth Amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating provisions of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment). See also *Lane*, 124 S.Ct. at 2111 (Scalia, J., dissenting) (describing incorporation doctrine).

59. Kimberley E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After Garrett?*, 43 B.C. L. REV. 697, 728 (2002) (describing the current Court's move from "the traditional rational relationship test . . . to a stricter congruence and proportionality test.").

60. For a more detailed discussion of these factors, see Pitts, *supra* note 14, at 243-46.

61. See, e.g., *Garrett*, 531 U.S. at 368-73 (conducting congruence and proportionality inquiry).

62. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. C. Sav. Bank*, 527 U.S. 627, 660 (1999) (Stevens, J., dissenting).

63. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

The Court's first five considerations of congressional remedies passed under the enforcement power involved a strict, searching, and skeptical look at the congressional record for evidence of constitutional violations.⁶⁵ This skeptical inquiry included the Court taking a very narrow view of what served as proof of a constitutional violation⁶⁶ and requiring those constitutional violations to have occurred contemporaneously with passage of the congressional remedy.⁶⁷ It also involved the Court only considering proof of governmental, not private, discrimination,⁶⁸ and limiting such proof to constitutional violations involving only state, not local, government activity.⁶⁹

But then along came the Family and Medical Leave Act (FMLA) and Title II of the Americans With Disabilities Act (ADA), and the Court found a couple of congressional remedies it could uphold.⁷⁰ In doing so, the Court retreated from its extremely stringent and skeptical review of the congressional record. Absent was a strict application of what the Court would consider as evidence of a constitutional violation.⁷¹ Absent was a

(famously characterizing how strict scrutiny seemed to work).

64. Robert C. Post & Reva B. Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000) (comparing congruence and proportionality to strict scrutiny).

65. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 125 (2001) (describing how the Court engaged in "searching, skeptical review" of the record of constitutional violations that supported enactment of the congressional remedy). See also Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1749 (2004) (describing how the initial applications of the congruence and proportionality doctrine "created the impression that it had become quite difficult for Congress to tap [its enforcement power].").

66. Katz, *supra* note 5, at 2364 n.130. "While the Court has not wholly rejected anecdotal evidence suggesting unconstitutional conduct, it has treated such examples with considerable skepticism and indicated its preference for examples of adjudicated constitutional violations." *Id.*

67. *Garrett*, 531 U.S. at 369 n.6 (noting a lack of evidence of unconstitutional disability discrimination at the time Congress adopted the ADA). See also John Alan Doran & Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of Federal Employment Discrimination Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 1, 44-45 (noting the need for a record of contemporaneous discrimination).

68. *Garrett*, 531 U.S. at 371-72 (rejecting evidence of disability discrimination by private-sector employers).

69. *Id.* at 368 (noting that Congress' enforcement power "is appropriately exercised only in response to state transgressions") (emphasis added).

70. *Lane*, 124 S. Ct. 1978 (upholding Title II of the Americans With Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding Family and Medical Leave Act).

71. *Lane*, 124 S. Ct. at 2000 (Rehnquist, C.J., dissenting) (criticizing evidence relied on by the majority opinion as "brief anecdotes . . . that were not sufficiently detailed to determine whether" unconstitutional activity had occurred). See also *Hibbs*, 538 U.S. at

strict requirement of recent constitutional violations.⁷² Absent was a strict mandate that only discrimination engaged in by state governments could serve as the evidentiary basis for the remedy.⁷³

Why this shift? The difference primarily seemed to lie in the fact that the FMLA and Title II operated in a realm where the Court itself was more protective of constitutional rights. For example, the FMLA targeted gender discrimination, a type of discrimination that the Court protects against by using a heightened level of equal protection scrutiny.⁷⁴ Similarly, Title II—at least as applied to access to the court system—also implicated constitutional rights deemed of greater importance to the Court.⁷⁵ This then required a substantially different review than congressional remedies the Court recently rejected, which had targeted types of governmental classifications, such as age, to which the Court provides a lesser level of scrutiny.⁷⁶

What one should take from this back and forth is that what's really going on in the congruence and proportionality decisions parallels what's happening on the substantive equal protection front in the affirmative action and racial gerrymandering decisions: the context surrounding the remedy matters in a big way. Congress will have greater freedom in terms of compiling a record of actual constitutional violations when it passes remedies to enforce "core" constitutional values—or at least what the Court views as "core" constitutional values. When Congress acts to protect citizens from the types of discrimination that the Court works harder to pre-

746 (Kennedy, J., dissenting) (criticizing the majority opinion for failing to require "specific" evidence of constitutional violations).

72. *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting) (criticizing the Court's majority opinion for failing to require evidence of contemporaneous constitutional violations).

73. *Id.* at 730 (relying on surveys of private-sector employment practices as evidence to support the constitutionality of the FMLA). See also *Lane*, 124 S. Ct. at 1999 (Rehnquist, C.J., dissenting) (criticizing the majority opinion for considering evidence that "does not concern *unconstitutional* action by the *States*") (emphasis in original).

74. *Hibbs*, 538 U.S. at 728. "We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny." *Id.*

75. *Lane*, 124 S. Ct. at 1988 (describing how Title II, as it related to access to the courts, "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial scrutiny."). It is important to note that the Court treats subcategories of discrimination differently. For instance, Title I of the ADA received a stricter form of congruence and proportionality review because it implicated disability discrimination in the context of employment. In contrast, Title II received an easier form of review because it implicated disability discrimination in the context of access to the courts.

76. *Hibbs*, 538 U.S. at 736. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet . . . it was easier for Congress to show a pattern of state constitutional violations." *Id.*

vent, such as gender discrimination, then the Court will give Congress wider berth in passing civil rights remedies; but when Congress acts to protect citizens from the types of discrimination to which the Court provides lesser protection, such as age discrimination, then the Court will give Congress very little, if any, room to maneuver.⁷⁷

In a way, congruence and proportionality may be adopting its own tiers of scrutiny akin to the tiers of scrutiny the Court uses in its equal protection doctrine. The Court seems likely to engage in a “strict” congruence and proportionality analysis when Congress legislates in arenas where the Court only provides rational basis scrutiny, with this strict congruence and proportionality analysis resulting in the need for Congress to compile an extensive record of actual, contemporaneous constitutional violations (probably by the states themselves) and then to pass a very narrowly tailored remedy (i.e., a remedy that only targets the states where actual discrimination occurred). In contrast, the Court will engage in an “intermediate,” or perhaps even “rational,” congruence and proportionality analysis when Congress legislates in arenas where the Court provides something greater than rational basis scrutiny. To pass remedies in these contexts, Congress will have to show some history of constitutional violations (probably by state *and* local governments) and then will have to show that the remedy provided does not completely subvert the Court’s ability to say what the law is and also does not violently disrupt state and local government autonomy (more on these limitations in a bit).⁷⁸

If we apply these lessons to racial discrimination in voting, we see that the Court pretty stringently protects constitutional rights in this arena. The Court protects against racial discrimination in all areas of government action, including voting, by engaging in strict scrutiny.⁷⁹ Indeed, even outside the context of race discrimination, the Court more carefully examines laws that implicate the electoral process.⁸⁰ So, like the FMLA and Title II,

77. It is true that *United States v. Morrison* involved the Court’s rejection of a remedy aimed at gender discrimination. 529 U.S. 598 (2000). However, much of *Morrison* relates to Congress’ power under the Commerce Clause. *Id.* at 607-19. Moreover, the portion of *Morrison* that does deal with Congress’ enforcement power almost entirely concerns the idea that Congress can only use its enforcement power against state actors. *Id.* at 619-26. In short, *Morrison* amounts to an atypical decision within the Court’s recent pronouncements about the scope of Congress’ enforcement power. See Althouse, *supra* note 65, at 1789. “Unlike *Hibbs* and all of the other cases in the *City of Boerne* line, however, *Morrison* looked at a statute that created a claim against private individuals.” *Id.*

78. See *infra* Part I.C.

79. *Shaw*, 509 U.S. at 650 (remarking that strict scrutiny should apply to a racial gerrymander because the Court’s Fourteenth Amendment jurisprudence “always has reserved the strictest scrutiny for discrimination on the basis of race.”).

80. See *Reynolds*, 377 U.S. at 562 (noting in a one person, one vote case that “any

Congress will have a much easier time compiling a historical record of actual constitutional violations by state and local governments to justify the imposition of a remedy when racial discrimination in voting is at stake.

Again, though, the obvious question arises as to why the Court should give more deference to Congress' enforcement power depending on the context. In fact, it seems counterintuitive for the Court to defer to Congress' judgment in areas where the Court itself more strictly enforces constitutional norms.⁸¹ Put more concretely, if Congress engages in race-based decision-making then it is subjected to strict scrutiny, but if Congress mandates that state and local governments engage in race-based decision-making then Congress gets a slightly freer hand. How can one square these seemingly inapposite treatments of Congress' ability to mandate the use of race?

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”). See also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (describing how “as a general matter, ‘before the right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny’”) (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)); *Kramer*, 395 U.S. at 626-27 (describing how state apportionment statutes and statutes denying the franchise to certain citizens are subject to “close scrutiny” by the Court); *Harper*, 383 U.S. at 670 (recognizing, in a voting rights case, that “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

Constitutional challenges to specific provisions of a State's election laws cannot be resolved by any “litmus-paper test” that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (citations omitted).

81. Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 345, 363 (2004).

It is counter-intuitive that where Congress has the greatest power to make classifications of individuals under its own equal protection and due process limitations, it has the least power to require states to comply with its classifications. Conversely, where Congress has the least power to make classifications, it has the greatest power to regulate the states.

Id.

They can be synthesized if you consider the twin rationales for congruence and proportionality—separation of powers and federalism⁸²—combined with the text and general gist of the Reconstruction Amendments. All the Reconstruction Amendments give Congress a role as the Court’s co-enforcer of the Amendments.⁸³ So it makes sense, from a separation of powers perspective, to give Congress a slightly greater amount of leeway to protect constitutional rights in situations where the Court, as a co-enforcer, provides greater scrutiny in the protection of constitutional rights. A similar rationale applies to federalism concerns. If the Court evinces a willingness in particular contexts to be tougher on state and local governments because the Reconstruction Amendments were meant to allow the Court to be more intrusive into state and local affairs, then it makes sense for Congress, as a co-enforcer, to also have a slightly greater ability to intrude into state and local affairs.⁸⁴

82. See Althouse, *supra* note 65, at 1787 (describing the dual rationales for congruence and proportionality).

83. U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000). “It is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.” *Id.* (alterations in original) (citations omitted). See also McCormick, *supra* note 81, at 362-63 (describing Congress’ role as a “coequal” in interpreting the Fourteenth Amendment).

84. *Contra* Erwin Chemerinsky, *Real Discrimination?*, 16 WASH. U. J.L. & POL’Y 97, 108 (2004) (arguing that there is no “apparent reason why the level of scrutiny for a type of discrimination should define the scope of Congress’s [enforcement] power.”). Professor Ellen D. Katz has similarly observed that Congress has greater power to enforce the prohibition on racial discrimination in voting. *Katz, supra* note 5, at 2343 (arguing that “Congress possesses broad discretion to free state political processes of racial discrimination, but enjoys far more limited authority to combat other forms of discrimination at the state and local level.”). Professor Katz finds the main rationale for this deference to be federalism, in that “[f]ostering effective state governance is thought to render unnecessary more intrusive and extensive federal regulation, and thus most faithfully to comport with the federal structure.” *Id.* at 2346. Her thesis is clever, interesting, and may well be correct. However, I think there is something more going on here, as the Court has recently shown a great deal of deference to congressional power to enforce gender and disability discrimination that would seem to have little to do with fostering democracy at the local and state level. In fairness, though, Professor Katz’s article was penned before the Court’s recent decision upholding Title II of the ADA. Moreover, she also recognized that deference in the realm of racial discrimination in voting did not necessarily “preclude[] deference to Congress in other arenas.” *Id.* at 2344.

C. RACIAL DISCRIMINATION IN VOTING IS DIFFERENT, BUT LET'S NOT GET CARRIED AWAY

The macro theory amounts to the idea that the Court considers racial discrimination in voting to be different both from a substantive equal protection perspective and from a congressional enforcement power perspective. That gives section 2, or any other congressional remedy aimed at racial discrimination in voting, a certain modicum of deference from the Court. This modicum of deference, though, does not by any means give Congress plenary power to pass whatever legislation it chooses when it comes to racial discrimination in voting.⁸⁵ What flows from this deference is a bit of latitude when it comes to tailoring a remedy to fit the problem of voting-related racial discrimination; a deference analogous to the deference provided to the University of Michigan Law School when the Court was determining whether that institution had a narrowly tailored race-based affirmative action program.⁸⁶

In my view, the meaning of narrow tailoring in the context of voting remedies related to racial discrimination enacted by Congress will boil down to the impact of the remedy on the twin rationales proffered by the Court for limiting Congress' enforcement power—separation of powers and federalism. Congress will not be allowed to put the full court press to the Court or to state and local governments, with two cases in point being how the Court dealt with both the FMLA and Title II. Both decisions explicitly stressed the manner in which these remedies somewhat complied with the Court's idea of the substance of constitutional rights⁸⁷ and generally complied with the Court's idea that state and local governments not be overly-burdened by Congress.⁸⁸ With that in mind, it's time to move away

85. See *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992) (noting that “[d]eference does not mean acquiescence.”).

86. *Grutter*, 539 U.S. at 309. “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Id.*

87. *Lane*, 124 S.Ct. at 1994 (describing how Title II, as applied to access to the courts, “is perfectly consistent with the well-established due process principle that, ‘within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard’ in its courts” (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))); *Hibbs*, 538 U.S. at 723 (describing how the FMLA complies with the Court's general nondiscrimination bent by providing a remedy for “all eligible employees, irrespective of gender.”) (emphasis in original).

88. *Lane*, 124 S.Ct. at 1993 (describing the “limited” remedy and how states need not “employ any and all means” to provide access to the disabled); *Hibbs*, 538 U.S. at 737 (describing the FMLA as “narrowly targeted at the fault line between work and family.”).

from a general theory about racial discrimination in voting being different and toward a specific analysis of whether section 2 can withstand the Court's separation of powers and federalism concerns.

II. SECTION 2 IS NOT A VIOLATION OF SEPARATION OF POWERS

Separation of powers and federalism comprise the Court's twin motivations for curbing Congress' power to pass legislative remedies that prevent a greater amount of government action than would be prevented by the Constitution standing alone. So let us move to the specifics of separation of powers as it relates to racial discrimination. Section 2 generally implicates the Court's equal protection/strict scrutiny doctrine because it involves the use of a race-based, affirmative action-type remedy. However, it primarily affects the Court's equal protection doctrine by specifically switching one particular subset of the Court's jurisprudence—the standard for proving unconstitutional vote dilution. Under the Constitution, a plaintiff must demonstrate that an electoral system was established or maintained for a discriminatory purpose in order to succeed on a vote dilution claim, whereas section 2 replaces that purpose standard with a test of discriminatory results.⁸⁹

So, section 2 amounts to something different than the constitutional standard enunciated by the Court, with the statute giving greater protection to minority voters than would be provided under the Constitution because a results standard places a lesser burden of proof on a vote dilution plaintiff than a purpose standard. For example, at a minimum, section 2 makes it easier for plaintiffs to prove racial discrimination in voting because federal judges are less likely to find local officials to be engaging in activity that has a discriminatory purpose than engaging in activity that has discriminatory results.⁹⁰ Yet section 2 cannot be rendered invalid merely because it replaces a purpose test with a results test, as even the current Court has consistently recognized that Congress can provide some remedies that go beyond what the judiciary itself might conjure up on a case-by-case basis.⁹¹

See also Winston Williams, *Check and Checkmate: Congress's Section 5 Power After Hibbs*, 71 TENN. L. REV. 315, 331-32 (2004) (describing the importance of the narrow scope of the FMLA to the Court's holding that the statute passed the congruence and proportionality test).

89. *Supra* note 15 and accompanying text.

90. Karlan, *supra* note 16, at 735.

91. *See Lane*, 124 S.Ct. at 1985. "We have thus repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'" *Id.* (internal quotes omitted). *See also Hibbs*, 538 U.S. at 727 (stating that "Congress may, in the exercise of its . . . [enforce-

What really underpins the Court's separation of powers concern is the potential for Congress to enact a remedy with the intent or effect of *totally* subverting the will of a majority of the Court. Put differently, the Court's worries seem to stem from the possibility that Congress could completely thumb its nose at the Court's ability to define the contours of what violates the Constitution. In essence, the paradigm of this problem is the case that first established the congruence and proportionality doctrine—*City of Boerne v. Flores*—where, hot on the heels of a decision by the Court that changed the constitutional standard for proving religious discrimination, Congress tried to summarily reverse the Court.⁹²

Some have argued, though, that section 2 represents an analogous fact scenario to that presented in *Boerne*.⁹³ In some sense that is right, but it is only half the story, and understanding why it is only half the story necessitates a short lesson in the history of vote dilution jurisprudence.

In the early 1970s, the Court decided *White v. Regester*.⁹⁴ In *White*, the Court held that minority plaintiffs could successfully attack electoral systems under the Constitution by proving vote dilution from an amalgamation of factors, few of which directly implicated government decision-makers as having acted with a discriminatory purpose. Moreover, *White* also did not seem to require a federal court to make an ultimate finding that the electoral system was purposefully discriminatory in order to conclude that a constitutional violation had occurred.⁹⁵ In essence, the lesson of

ment] power, do more than simply prescribe conduct that we have held unconstitutional.”); *Garrett*, 531 U.S. at 365 (noting that “Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence.”); *Kimel*, 528 U.S. at 81 (stating that “[r]ather, Congress’ power ‘to enforce’ the [Fourteenth] Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”); *Florida Prepaid*, 527 U.S. at 638 (noting Congress’ enforcement power allows for passage of statutes even if those statutes “prohibit[] conduct which is not itself unconstitutional . . .”); *Boerne*, 521 U.S. at 518 (stating that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes on ‘legislative spheres of autonomy previously reserved to the States.’”).

92. *Boerne*, 521 U.S. at 513-14. See also Althouse, *supra* note 65, at 1785 (describing RFRA as “a statute explicitly designed to overrule a Supreme Court decision.”).

93. See, e.g., Katz, *supra* note 5, at 2403-04. Accord Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L. Q. 1, 15-16 n.81 (1984). “The 1982 amendment to § 2 was for the express purpose of declaring the congressional intent that a violation of the statute could be established by showing the discriminatory effect of the challenged practice.” *Id.*

94. 412 U.S. 755 (1973).

95. *Id.* at 765-66. See also Frank R. Parker, *The ‘Results’ Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 718-26 (1983)

White was that a minority plaintiff could win a vote dilution case by using evidence of discriminatory effect and without proving discriminatory purpose on the part of government officials.

That all changed in 1980, when the court decided *City of Mobile v. Bolden*.⁹⁶ In *Bolden*, a plurality of the Court interpreted or, more accurately, re-interpreted *White* as requiring a federal court to make a finding that the electoral system was purposefully discriminatory.⁹⁷ Perhaps more importantly, the *Bolden* plurality made it tougher to prove unconstitutional vote dilution by requiring more direct evidence of discriminatory purpose. In other words, unconstitutional vote dilution could no longer be proved using the *White* evidentiary standard. The upshot of *Bolden* was that minority plaintiffs became saddled with a new constitutional standard that made it more difficult to successfully attack the large numbers of state and local election systems that did not allow minority voters to elect any of their strongly preferred candidates (i.e., minority candidates).

Bolden earned the Court harsh criticism, and Congress responded to this criticism by amending section 2.⁹⁸ As amended, section 2 allowed minority plaintiffs to win a vote dilution case under a “results” standard when

based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of [a protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁹⁹

By all accounts, the results standard represented a return to the pre-*Bolden* constitutional rule,¹⁰⁰ as much of the key statutory language came straight out of *White*.¹⁰¹

(canvassing the pre-*Bolden* standard for proving unconstitutional vote dilution).

96. 446 U.S. 55 (1980) (plurality opinion).

97. *Id.* at 65.

98. See Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 347 (1982) (noting the criticism generated by *Bolden*).

99. 42 U.S.C. § 1973(b) (2000).

100. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (plurality opinion) (describing the amendment to section 2 as “largely a response to this Court’s plurality opinion in *Mobile v. Bolden*.”). See also Kathryn Abrams, ‘Raising Politics Up’: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 458 (1988) (describing the reason that Congress amended section 2).

This history, however, only provides a description of Act I of the constitutional play. Act II occurred a couple of days after amended section 2 became law when the Court handed down *Rogers v. Lodge*¹⁰²—another constitutional vote dilution case. *Rogers* retained the *Bolden* requirement that federal courts make an ultimate finding of discriminatory purpose in order to hold that an electoral system violates the Constitution.¹⁰³ However, *Rogers* returned the evidentiary standard for proving such purpose much closer to the one used by the Court prior to *Bolden*. Put differently, the way the Court applied the purpose standard in *Rogers* amounted to something remarkably similar to the constitutional standard the Court had employed pre-*Bolden* when a less stringent test existed.¹⁰⁴ Yet, to this day, it is not uncommon for commentators to give *Rogers* short shrift when discussing the constitutional standard for vote dilution¹⁰⁵ and the constitutional propriety of amended section 2¹⁰⁶ even though, when it comes right down to it, the evidentiary factors involved in proving a constitutional violation

101. *White*, 412 U.S. at 766.

The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id.

102. 458 U.S. 613 (1982).

103. *Id.* at 617.

104. *Id.* at 628-29. "Whatever the wisdom of *Mobile*, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But *Mobile* held that this *kind* of evidence was not enough." *Id.* (Powell, J., dissenting) (emphasis in original). See also Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 GEO. WASH. L. REV. 689, 720 (1982) (describing how "*Rogers* at least signals a retreat from the *Bolden* plurality's single-minded focus on intent to *White v. Regester's* totality of circumstances test"); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives On the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 675 n.196 (1983) (noting how Justice White dissented in *Bolden* and how "[i]t is at least arguable that Justice White's view of the relevant evidence necessary to establish a claim in a vote dilution case ultimately prevailed in his majority opinion for the Court in *Rogers v. Lodge*.").

105. Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1 (1987) (engaging in an extended discussion of vote dilution jurisprudence with only the most limited citation to and discussion of *Rogers*).

106. See generally Katz, *supra* note 5, at 2402-08 (engaging in extended discussion of the constitutionality of section 2 without citation to *Rogers*). But see Guard, *supra* note 21, at 359 (noting that "the heavy burden for proving unconstitutional vote dilution approved in *Bolden* has been lessened by the Court in *Rogers v. Lodge*, which allows an inference from impact and effects.").

in *Rogers* are pretty much the same as the evidentiary factors involved in proving a violation of amended section 2.¹⁰⁷

Yet despite the similarities between *Rogers* and section 2, the latter has been interpreted to put substantially more emphasis on three evidentiary factors—the ability to draw a single-member district with a majority of minority population, the presence of a cohesive minority voting bloc, and the existence of a cohesive majority voting bloc that will usually defeat the chosen candidate of the cohesive minority voting bloc.¹⁰⁸ Indeed, an over-emphasis on these three factors, highlighted by Justice William Brennan's plurality opinion in the seminal section 2 case of *Thornburg v. Gingles*,¹⁰⁹ may have led some federal courts to almost always find a violation of section 2 whenever these three conditions existed.¹¹⁰ In turn, the over-emphasis on these three factors might arguably have placed section 2 in constitutional jeopardy because it made the provision look like a reflexive use of a race-based remedy through reliance on numbers and statistics alone that could have been considered to be the enforcement of some sort of proportional representation rule¹¹¹ or, to put it more starkly, an unconstitutional electoral quota.¹¹²

107. James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 32 (1982). "It is difficult, however, to distinguish the *Rogers* 'intent' test from the 'results' test of the Voting Rights Act." *Id.* But see Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistrictor"*, 30 U.S.F.L. REV. 1, 8 (1995) (arguing that "the 1982 amendment to Section 2 of the Voting Rights Act was a radical change in the law, creating a very strict 'effects' test for measuring whether a violation of the Act has occurred.").

108. *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (describing "compactness/numerousness, minority cohesion, and majority bloc voting as 'necessary preconditions' for establishing vote dilution by use of a multimember district."). It is true, however, that the courts had used, in addition to these three factors, evidence that a "societal discrimination against the minority had occurred and continued to occur." *Id.* at 1016. Nevertheless, such "incidents of societal bias [are] to be expected where bloc voting occurs." *Id.*

109. 478 U.S. 30 (1986).

110. See, e.g., *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996) (noting that "it will only be the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances.") (quoting *Clark v. Calhoun Co.*, 21 F.3d 92, 97 (5th Cir. 1994)).

111. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003) (finding an automatic numerical enhancement for minority college applicants to lack the narrow tailoring required to meet strict scrutiny).

112. See Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 U.C.L.A. L. REV. 2031, 2038-39 (1996) (linking the idea of "quotas" with "race-driven" redistricting).

However, the plain language of section 2 expressly denies the federal courts the right to mandate proportional representation.¹¹³ Moreover, the current Court has led the way toward limiting the reach of section 2 so that state and local governments are not required to draw majority-minority single-member districts whenever the three conditions exist,¹¹⁴ and lower

113. 42 U.S.C. §1973(b) (2000) (providing that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”).

It is important to distinguish between two threads of proportional representation presented by section 2—proportional representation in relation to the *finding* of a section 2 violation and proportional representation as related to the *remedy* for a section 2 violation. See Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1626 n.39 (1983). “The proviso at the end of amended § 2—facially disclaiming that the amendment created an affirmative right to proportional representation—is ‘meaningless as a barrier to proportional representation because . . . it is absolutely silent in addressing remedies, as opposed to the substantive violation, required by the results test.’” *Id.* (internal quotes omitted).

When a federal court adjudicates whether or not a section 2 violation exists, it would be improper for a court to find a violation whenever minorities have not achieved roughly proportional representation. Take, for example, a hypothetical jurisdiction with a thirty-three percent minority population and an elected body of nine members from single-member districts. Absent strong evidence (*i.e.*, a substantial amount of direct evidence of purposeful discrimination) that the totality of the circumstances shows an unequal opportunity to participate in the electoral process, it would be improper for a federal court to find a violation of section 2 if minority voters controlled the outcome of the election in two of the nine districts even if an additional district could be drawn that would allow for proportional representation.

In contrast, it is proper for a court to use rough proportionality as a guideline for remedying a violation of section 2. This is because a violation of section 2 generally means that minority voters have been almost completely shut out of the process for some time, so it makes sense to give them a maximum amount of relief for having been subjected to this legal wrong. So, returning to the above-described hypothetical jurisdiction, if there were no districts in which minority voters controlled the outcome and the totality of circumstances indicated a violation of section 2, it would be proper for a federal court to order, as a remedy, the creation of three-majority-minority districts.

114. *De Grandy*, 512 U.S. at 1009.

The District Court found that the three *Gingles* preconditions were satisfied, and that Hispanics had suffered historically from official discrimination, the social, economic, and political effects of which they generally continued to feel. Without more, and on the apparent assumption that what could have been done to create additional Hispanic supermajority districts should have been done, the District Court found a violation of § 2. But the assumption was erroneous, and more is required, as a review of *Gingles* will show.

Id. See also Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 264 (2003) (recognizing a difference between section 2 as interpreted in *Gingles* and as interpreted in *DeGrandy*).

federal courts have, in turn, followed this lead.¹¹⁵ In fact, from all appearances, Justice O'Connor's concurring opinion in *Gingles*, which expressed concern that Justice Brennan's plurality opinion served to mask a proportionality standard,¹¹⁶ has probably become the controlling law for finding a violation of section 2.¹¹⁷ Thus, section 2, at least as currently interpreted, does not require a reflexive resort to a racial calculus that requires any and all majority-minority districts to be drawn: it is most definitely not a racial quota.

In sum, section 2 does not represent a separation of powers problem. This is because, even though section 2 does not require a finding of purposeful discrimination, the standard the Court uses to determine unconstitutional purpose in the maintenance of an electoral system is relatively similar and certainly not totally divorced from the standard used in the section 2 results test. Relatedly, section 2 does not require a reflexive use of race that amounts to an unconstitutional quota. Separation of powers, however, only amounts to one part of the formula for determining whether Congress has overstepped its bounds in creating a civil rights remedy against state and local governments. What about federalism?

III. SECTION 2 IS NOT AN UNREASONABLE FEDERALISM BURDEN

The current Court clearly has evinced a general sentiment toward getting Congress off the backs of state and local governments, as a federalism revival seems to be the current Court's signature contribution to constitu-

115. See, e.g., *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1235 (11th Cir. 2000) (upholding district court's finding that no section 2 violation existed even though plaintiffs had proven the *Gingles* preconditions). See also *United States v. Alamosa County*, 306 F.Supp.2d 1016, 1040 (D. Colo. 2004) (stating that "[a]lthough the evidence presented at trial is arguably facially sufficient to satisfy the three *Gingles* preconditions, upon consideration of the totality of the circumstances, it does not prove that the at-large method of electing county commissioners in Alamosa County dilutes the vote of Hispanic residents.").

116. *Gingles*, 478 U.S. at 105 (O'Connor, J., concurring). "I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2." *Id.*

117. For example, in the recent case of *Georgia v. Ashcroft*, 539 U.S. 461 (2003), Justice O'Connor wrote an opinion that cited *Gingles* sixteen times, with thirteen of those cites to her concurring opinion in that case and three to Justice Brennan's plurality opinion. *Id.* at 478, 480-85. Admittedly, however, one could argue that *Georgia* does not speak to what section 2 requires because *Georgia* was not a section 2 case but instead involved the Court's interpretation of a companion provision of the Voting Rights Act—section 5. But see Samuel Issacharoff, *Is Section 5 of the Voting Rights Act A Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1727-28 (2004) (suggesting that *Georgia* "bring[s] the outcome of the section 5 analysis into conformity with" section 2).

tional interpretation. Even so, it is hard to see that the current Court's (or any moderately conservative Court's) interpretation of section 2 presents an insurmountable affront to federalism values. Indeed, section 2 does not pose a much greater burden on the federalist system than the constitutional standard imposed by the Court in *Rogers*. Moreover, even assuming section 2 places some extra burden on federalism, that burden surely seems to not be an unreasonable one.

Before taking on the federalism burden of section 2, however, it is useful to take a brief diversion into the two different types of remedies Congress can pass under its enforcement power. These could roughly be characterized as "judicial" and "strict liability." A judicial remedy is just that. It creates a remedy that provides a standard "designed to control cases and controversies" for a particular cause of action against a state or local government.¹¹⁸ For example, the Religious Freedom Restoration Act created a cause of action and a different judicial standard for plaintiffs who sued state and local governments for religious discrimination.¹¹⁹ Another example would be Title I of the Americans With Disabilities Act, which creates a cause of action and a different judicial standard for proving employment-related disability discrimination.¹²⁰

In contrast, a "strict liability" remedy only creates a cause of action against a state or local government for failing to follow some relatively clearly defined course of action. For example, the Family and Medical Leave Act mandates that a state provide up to twelve weeks of time off for an employee under certain circumstances.¹²¹ No (or at least not many)¹²² ifs, ands, or buts. Another example of a strict liability remedy would be a complete ban on literacy tests as a prerequisite for voter registration.¹²³ These strict liability remedies are enforceable in court, but they do not really set down a different judicial standard by, for example, changing a purpose test to an effects test for an entire class of cases. Also, unlike judicial remedies, strict liability remedies tend to be narrower in their scope, touching only upon a small subset of a larger group of activities. Put more

118. *Boerne*, 521 U.S. at 536.

119. *Id.* at 515-16 (describing the framework of RFRA).

120. *Garrett*, 531 U.S. at 360-61 (describing the framework of Title I of the ADA).

121. *Hibbs*, 538 U.S. at 724. "The Family and Medical Leave Act of 1993 . . . entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a serious health condition in an employee's spouse, child, or parent." *Id.* (internal quotes omitted).

122. *Id.* at 737-40 (describing conditions placed on employees seeking to invoke FMLA rights).

123. 42 U.S.C. § 1973a(b) (2000) (providing for a nationwide ban on all literacy tests).

concretely, Title I of the ADA applies to a whole host of employment practices while the FMLA applies to a very small subset of employment practices.¹²⁴

Section 2 falls pretty squarely into the judicial remedy category,¹²⁵ and generally it would seem that a judicial remedy will have a greater likelihood of violating separation of powers values than of violating federalism values. This is because a judicial remedy does not completely rule out a particular course of conduct by state and local government, but instead requires plaintiffs to prove their substantive case before a federal judge. That said, the larger the amount of government conduct reached and the further away the judicial remedy gets from the Court's view of the substance of constitutional rights, the greater the federalism cost of a judicial remedy. A judicial remedy also incurs greater federalism costs when Congress makes monetary damages available to plaintiffs.

Section 2, however, does not incur much of a federalism cost on any of these fronts. As previously mentioned, section 2 does not stray very far from the Court's view of the substance of constitutional rights. Section 2 also implicates only a relatively finite amount of government activity; that which is voting-related. Finally, section 2 does not incur federalism costs in terms of money damages—unlike the Patent Act and some other con-

124. *Hibbs*, 538 U.S. at 738 (describing the FMLA as “narrowly targeted at the fault line between work and family,” unlike other statutes rejected under the congruence and proportionality standard that “applied broadly to every aspect of [the] state employers’ operations.”).

125. Some civil rights remedies combine both a judicial and strict liability remedy. For example, section 5 of the Voting Rights Act requires certain state and local governments to secure approval from the federal government before implementing any voting change. 42 U.S.C. § 1973c (2000). Section 5 provides a strict liability remedy in that private plaintiffs can get an injunction preventing the use of any voting practice not approved by the federal government, regardless of whether the voting change is discriminatory. *See Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) (noting that “[i]f voting changes subject to § 5 have not been pre-cleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.”). *See also United States v. Louisiana*, 952 F.Supp. 1151, 1157-58 (W.D. La. 1997) (describing elements of proof for plaintiff to garner injunction preventing use of non pre-cleared voting change). Section 5 also provides a judicial remedy by requiring that jurisdictions seeking preclearance prove that their voting changes do not discriminate in purpose or effect. *Georgia*, 539 U.S. at 464 (setting forth the standard for determining whether a voting change is discriminatory in effect); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 340-41 (2000) (setting forth the standard for determining whether a voting change is discriminatory in purpose).

gressional remedies recently tossed out by the Court,¹²⁶ section 2 gives plaintiffs no right to raid the treasuries of state and local governments.¹²⁷

Nevertheless, even if state treasuries are safe, money costs flow from the imposition of legal fees. These fees could arise from hiring lawyers to defend lawsuits, or hiring legal advisors (i.e., redistricting consultants) to ensure compliance with the law. But, despite the fact that voting rights cases cost quite a bit to litigate,¹²⁸ section 2 probably does not cost all that much on the litigation scale. States can be sued and must hire legal advisors to comply with the statute, but even absent section 2, state and local governments would be sued and would hire legal advisors for voting matters. In fact, the Court itself allows plaintiffs to bring a cause of action for unconstitutional racial discrimination in voting. So, if section 2 did not exist, there would just be a lot more constitutional claims instead of section 2 claims; either way, there would probably be a fair amount of litigation. Moreover, voting is so loaded with legal rules already that complying with section 2 does not cost state and local governments a much greater amount of money in legal advice than a world without section 2. This is not to say that there are no legal costs, just probably not a much greater cost.¹²⁹

But money, as they say, isn't everything, and section 2 exacts less quantifiable federalism costs, such as the idea that the majority of the people who comprise the electorate of state and local governments will not be able to choose for themselves their own electoral rules, and instead will have those systems thrust upon them by the federal judiciary. In this way, section 2 imposes its greatest burden on the people of state and local governments by limiting the use of certain types of electoral features that typically serve to allow narrow majorities of a jurisdiction's population to completely dominate local governance¹³⁰—most often by forcing the replacement of at-large elections with single-member districts.¹³¹

126. *Florida Prepaid*, 527 U.S. at 637 (describing how the Patent Remedy Act was intended to provide "compensation" for patent infringement).

127. *Hibbs*, 538 U.S. at 744-45 (Kennedy, J., dissenting) (describing the protection of "a State's fiscal integrity from federal intrusion" as an important factor in support of the congruence and proportionality doctrine).

128. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1279 n.173 (1989) (describing the expense of voting rights litigation).

129. See Sanford Levinson, *The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality*, 2002 U. CHI. LEGAL F. 119, 121 (2002) (discussing the one person, one vote doctrine and noting how "[p]art of the political calculus of reapportionment decisions by state legislatures is the knowledge that, almost inevitably, they will be challenged in court.").

130. *Rogers*, 458 U.S. at 616. "At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district." *Id.* (emphasis in original). See also *Holder v.*

However, section 2's unquantifiable costs do not create a tremendous burden on state and local democracies. After all, it is not like section 2 thrusts some sort of completely undemocratic system on anyone. Section 2 does not remove anybody's right to cast a ballot to choose their representatives and their manner of governance. What section 2 primarily accomplishes is the granting of some measure of electoral success to populations who might otherwise continue to be almost always *completely* shut out of the electoral spoils.¹³² This is not to say that state and local governments do not lose some of their freedom in the balance; it's just to say that state and local governments do not really lose an overwhelming amount of freedom.

Yet what about the idea that at-large election systems might constitute a superior form of electing representatives than single-member districts, and state and local governments lose the benefits that inure from at-large systems?¹³³ This could be true, but such an argument is really just a coffeehouse debate that no one will ever really definitively win.¹³⁴ And even if some "good governance" cost arises from using single-member districts, certainly some democratic benefit flows from creating state and local governing bodies that have more of an opportunity to look like their constituencies and "to ensure that representative bodies are responsive to the entire electorate"¹³⁵—with this responsiveness perhaps resulting in the establishment of a greater quantum of confidence in the fairness of our government for some portion of the electorate and, thus, greater stability.¹³⁶

Hall, 512 U.S. 874, 898 (1994) (Thomas, J., concurring) (describing the perceived advantage of single-member districts as "their tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body.").

131. Davidson & Grofman, *supra* note 3.

132. Hartman, *supra* note 104, at 692 (describing how an at-large election system "can operate to exclude the minority completely from access to the channels of government.").

133. See Ortiz, *supra* note 54, at 1129-30 (describing the benefits of at-large elections).

134. See Holder, 512 U.S. at 901 (Thomas, J., concurring) (remarking that "there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy.").

135. Rogers, 458 U.S. at 640 n.21 (Stevens, J., dissenting).

136. Hartman, *supra* note 104, at 738. "The presence of minority representatives in the councils of government performs the valuable function of creating a sense of shared responsibilities and shared rewards between majority and minority and may enhance the stability of the system." *Id.* See also Donald P. Kommers, *The Right to Vote and Its Implementation*, 4 N.D. L. REV. 365, 366-67 (1964).

Indeed, if citizens are not allowed to participate in electoral processes or are made to feel that they do not belong, they cannot be expected to develop any genuine loyalty to the political system under which they live

But the Court has hinted that federalism concerns require the federal judiciary to give some amount of deference to states when reviewing the propriety of redistricting plans.¹³⁷ However, what drives this deference is not really adherence to federalist principles, but an adherence to the idea of, as much as possible, keeping the Court out of the political process.¹³⁸ Moreover, even if some sort of federalism interest exists in leaving districting to state and local governments, section 2 partially recognizes this interest. When a federal court finds a section 2 violation that requires the use of single-member districts, the federal court always gives the state or local entity the opportunity to take first crack at drawing a districting plan that remedies the violation.¹³⁹

and, after a time, may even begin to question the legitimacy of the system itself.

Id. Accord Paul W. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 388-89 (1976) (describing how the election of minority candidates “insure[s] a minority viewpoint in deliberations and debate” and “is important psychologically as a symbol of accomplishment and as an indication to minorities that they can participate in government.”).

One could argue that section 2 creates a “cost” of heightened racial awareness, but that would really just be bringing in a substantive equal protection argument through the back door. In other words, once you decide to allow some use of race in the voting context, (*see, e.g., Cromartie*, 532 U.S. 234) then it’s hard to say section 2 creates a much greater amount of racial consciousness.

137. *See Miller*, 515 U.S. at 915 (1995). “Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Id.* *See also id.* at 934-35 (describing the Court’s agreement about how federalism weighs heavily against judicial involvement in districting decisions) (Ginsburg, J., dissenting); *see also Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (stating that “[t]he task of redistricting is best left to state legislatures, elected by the people and as capable as courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.”). *Accord Holder*, 512 U.S. at 916 (Thomas, J., concurring). “Interfering with the form of government, therefore, might appear to involve a greater intrusion on state sovereignty [than interfering with districting plans].” *Id.*

138. *See Cromartie*, 532 U.S. at 242 (stating that districting decisions “ordinarily fall[] within a legislature’s sphere of competence” because “the legislature ‘must have discretion to exercise the political judgment necessary to balance competing interests.’”) (quoting *Miller*, 515 U.S. at 915).

139. *See McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981). “Our prior decisions in the apportionment area indicate that, in the normal case, a court that has invalidated a State’s existing appointment plan should enjoin implementation of that plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment.” *Id.* *See, e.g., Citizens for Good Govt. v. City of Quitman*, 148 F.3d 472, 475 (5th Cir. 1998) (noting the general principle that a federal court should, after finding a jurisdiction in violation of section 2, grant the governing body of the jurisdiction “an opportunity to enact an acceptable plan.”) (internal quotes omitted).

The plain fact, as recognized even by the current, federalist-leaning Court, remains that the Fourteenth and Fifteenth Amendments, by their nature, contemplate some intrusion by the federal government into state and local affairs so as to secure the right to vote.¹⁴⁰ Certainly, one can argue that the Reconstruction Amendments should only empower Congress to create racially neutral “access” to cast a ballot through fair rules for things like voter registration, rather than to create fair rules to prevent vote dilution.¹⁴¹ However, that bus seems to have passed a long time ago. Once one accepts, as a solid majority of the Court seems to have accepted for some time now, that electoral systems represent fair game under the Constitution, then it seems hard to convincingly argue that Congress’ statutory mandate of a certain type of electoral system amounts to a far more overwhelming intrusion into the affairs of state and local governments than the intrusion of the Constitution itself.¹⁴²

CONCLUSION

Section 2 will be around at least as long as the Court’s jurisprudence continues to reflect the moderately conservative values of its current members. Indeed, the Court may soon get a chance to more firmly implant this congressional remedy on the Nation’s electoral landscape, as cases bringing congruence and proportionality challenges to section 2 have begun to work their way up the judicial hierarchy.¹⁴³ While other voting rights remedies may have greater problems under the Court’s recent decisions,

140. See *Lopez v. Monterey County*, 525 U.S. 266, 284-85 (1999) (noting that “the Voting Rights Act, by its nature intrudes on state sovereignty . . . [and the] Fifteenth Amendment permits this intrusion”). See also *City of Rome*, 446 U.S. at 179 (noting that the Reconstruction Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”); *Duncan*, 391 U.S. at 173 (Harlan, J., dissenting). “The Civil War Amendments dramatically altered the relation of the Federal Government to the States.” *Id.*

141. I suspect Justice Clarence Thomas might be a proponent of this kind of theory, as he argued in *Holder* that section 2 should not apply to voting practices that dilute minority votes. 512 U.S. at 893 n.1 (Thomas, J., concurring) (allowing that “many of the basic principles” discussed in his concurrence “are equally applicable to constitutional vote dilution cases.”).

142. This should not be taken as an argument that federal courts use section 2 to require the implementation of proportional representation systems such as cumulative voting. This is because Congress, in amending section 2, did not endorse such remedies but rather endorsed a Supreme Court case in which single-member districts served as the proper remedy for vote dilution. *Supra* notes 100-101 and accompanying text.

143. See, e.g., *Blaine County*, 363 F.3d at 903-09 (applying the congruence and proportionality standard to section 2).

primarily owing to federalism concerns, section 2's place in our system of government will remain secure.